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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

PACIFIC ALLIANCE LOANS, Plaintiff and Appellant, v. OUITA MARTIN AND THOMAS JOHNS, et al., Defendants and Respondents.	H043526 (Santa Clara County Super. Ct. No. 2010-1-CV-165982) OPINION

THE COURT[1]

APPEAL from orders of the Superior Court of Santa Clara County. Mary E. Arand, Judge.

Pacific Alliance Loans (dba Hernando R. Pedagat), Plaintiff and Appellant In Propria Persona.

John M. Sorich, Bryant Delgadillo, and Jenny L. Merris, for Defendant and Respondent J.P. Morgan Chase Bank, N.A.

Glenn H. Wechsler and Claudia Williams, for Defendants and Respondents First American Loanstar Trustee Services, formally known as Loanstar Mortgagee Services, LLC, First American Title Insurance Company, and DeeAnn Gregory.

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[1] Before Greenwood, P.J., Bamattre-Manoukian, J. and Danner, J.

Appellant Pacific Alliance Loans (dba Hernando R. Pedagat) (hereinafter P.A.L.) appeals the trial court orders denying its motion to vacate a dismissal entered in 2011, and for leave to file a first amended complaint. Through a series of judgments and orders issued in 2010 and 2011, the trial court dismissed the complaint filed by Hernando R. Pedagat individually and as the founder of P.A.L., as to each of the named defendants; all but one of the dismissals was with prejudice. P.A.L. waited until 2016 to ask the trial court to vacate the one dismissal issued without prejudice, and to seek leave to file an amended complaint. On appeal, P.A.L. contends the trial court erred in denying its 2016 requests for relief. Pedagat was declared a vexatious litigant in California in August 2010, subject to a pre-filing order under Code of Civil Procedure[2] section 391.7. As P.A.L. is not a separate legal entity from Pedagat, and we find the appeal to be without merit, we conclude Pedagat improperly filed the instant appeal without first seeking the required pre-filing order, and dismiss the appeal accordingly.

I. PROCEDURAL BACKGROUND[3]

In March 2010, Pedagat and P.A.L.[4] filed a complaint for 1) damages for conspiracy (fraud, conversion), and 2) cancellation of instrument (fraud) (complaint), naming 10 separate defendants, including Mortgage Electronic Registration System/ Chase Home Finance, LLC, Chase Manhattan Mortgage Corporation,[5] Susan Lemire, Loanstar Mortgagee Services, LLC, First American Title Insurance Company, and

[2] All future undesignated references are to the Code of Civil Procedure.

[3] Given our ruling in this appeal, we focus on the procedural history following the filing of the underlying complaint, rather than the factual history that led to the lawsuit.

[4] Pedagat is listed as a separate plaintiff in the complaint, suing both as an individual and as the founder and sole proprietor of P.A.L.

[5] Respondent on appeal is JP Morgan Chase Bank, N.A., successor by merger to Chase Home Finance, LLC, who was the successor by merger to Chase Manhattan Mortgage Company. For purposes of this opinion we will refer to this respondent as Chase for sake of clarity.

DeeAnn Gregory.[6] In April 2010, defendants Chase, Mortgage Electronic Registration Systems, Inc., "erroneously sued as Mortgage Electronic Registration System/Chase Home Finance, LLC," Loanstar Mortgagee Services, LLC, First American Title Insurance Company, and DeeAnn Gregory[7] demurred to the complaint. The court sustained the demurrers without leave to amend. Chase and the Loanstar defendants served notice of entry of these orders on Pedagat by mail in July and August 2010. Subsequently, all other defendants, except Lemire, who P.A.L. alleged was an "agent for loss mitigation department of Chase Manhattan Mortgage Corp.," successfully demurred to P.A.L.'s complaint; as it did with Chase and the Loanstar defendants, the court sustained the other demurrers without leave to amend.

In an order issued in August 2010, the Superior Court of Santa Clara County declared Pedagat a vexatious litigant in case No. 110CV170623, subject to a prefiling order under section 391.7.[8] Such an order "prohibits a vexatious litigant from filing any new litigation in the courts of this state in propria persona without first obtaining leave of the presiding justice or presiding judge of the court where the litigation is proposed to be filed." (§ 391.7, subd. (a).)

In November 2010, the court issued an order for P.A.L. to appear and show cause why sanctions should not be imposed or why the case "should not be dismissed for failure to serve the summons and complaint as required by California Rules of Court 3.110."[9] Although the order does not specify which defendant(s) had yet to be served, by

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[6] The other named defendants are Ouita Martin and Thomas Johns, a general partnership; Robert Cruz and Carolina Cruz; Liese Varenkamp; and, Santa Cruz Record. None of these defendants filed pleadings on appeal.

[7] As respondents Loanstar Mortgagee Services, LLC, First American Title Insurance Company, and DeeAnn Gregory filed pleadings together both in the trial court and on appeal, we will collectively refer to them as the Loanstar defendants.

[8] The Judicial Council maintains a record of vexatious litigants subject to prefiling orders, which it disseminates to the clerks of the courts of this state. (§ 391.7, subd. (f).)

[9] California Rules of Court, rule 3.110(b) requires the plaintiff to file proof of service of the complaint on all defendants "within 60 days after filing of the complaint." (All undesignated references to rules of court are to the California Rules of Court unless

that time all defendants except Lemire had appeared and demurred to the complaint. In December 2010, P.A.L. filed a proof of service indicating it had the summons, complaint, and other documents served on Lemire by "mail and acknowledgment of receipt" on March 19, 2010. Specifically, P.A.L. checked the box on the preprinted Judicial Council form indicating it served Lemire through CT Corporation System, an authorized agent for service of process, "with two copies of the *Notice and Acknowledgment of Receipt* and a postage-paid return envelope addressed to [P.A.L.]," pursuant to section 415.30. Attached to the proof of service was a "U.S. Postal Service™ Delivery Confirmation™ Receipt," as well as a printout seemingly from the U.S. Postal Service website showing delivery on March 22, 2010. There are no signatures on either of these attachments. The proof of service does not have a completed Notice and Acknowledgment of Receipt attached to it; the preprinted Judicial Council form *Proof of Service* includes an instruction to attach the document to the proof of service.[10]

At a hearing in January 2011, the trial court dismissed the complaint as to Lemire only. The written order filed with the court indicates the court, having found "good cause," dismissed the case "without prejudice" for "[f]ailure to serve defendant Susan Lemire," noting the dismissal was "as to Susan Lemire ONLY." The court clerk served the written order on P.A.L. by mail on January 21, 2011.

In February 2016, P.A.L. filed a motion to set aside and vacate the order dismissing the complaint against Lemire, on the grounds it was void on its face. At the same time, P.A.L. filed a motion for leave to file a first amended complaint setting forth causes of action for "1) Damages for Conspiracy (Fraud); 2) Cancellation of Instruments – Trustee's Deed Upon Sale; 3) Intentional Infliction of Emotional Distress;

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otherwise noted.) "If a party fails to serve and file pleadings as required under this rule, and has not obtained an order extending time to serve its pleadings, the court may issue an order to show cause why sanctions shall not be imposed." (Rule 3.110(f).)

[10] Section 417.10, subdivision (a) provides, "If service is made by mail pursuant to Section 415.30, proof of service shall include the acknowledgment of receipt of summons in the form provided by that section or other written acknowledgment of receipt of summons satisfactory to the court."

4) Intentional Tort of Interference with Prospective Economic Advantage; 5) Violation of California Business and Profession [sic] Code, Section 17200 Et. Seq." (Capitalization omitted.) In support of that motion, P.A.L. argued the court's discretion to allow amendment should be liberally exercised, that P.A.L. did not discover the facts supporting the cause of action for conspiracy until November 2013, and that the amendment was necessary to add necessary parties, remove unnecessary parties, and correct mistakes in the original complaint.

On February 25, 2016, the trial court issued an oral ruling denying both the motion to vacate the dismissal and the motion for leave to amend. In doing so, the court adopted the tentative rulings issued prior to the hearing. It denied the motion to set aside and vacate the dismissal, stating, "Plaintiff has not established that the dismissal is void, as no valid proof of service is found in the court file. The motion, seeking to set aside a dismissal entered more than 5 years ago, is untimely (see CCP 473(d) [sic]." It denied the motion for leave to file a first amended complaint on the grounds, "Multiple judgments and dismissals have been entered in this case, and it is too late to seek to amend the complaint." On March 4, 2016, JP Morgan Chase Bank filed a document entitled "Notice Of Ruling Re: Motions Of Plaintiff Pacific Alliance Loans (Dba Hernando R. Pedagat) For (1) Leave Of Court To Amend Complaint And For An Order To File First Amended Complaint, And (2) For An Order To Set Aside And Vacate Court's Order Of Dismissal." (Emphasis and capitalization omitted.) This pleading is not signed by the court, and thus is not a formal written order. (See rule 3.1312.) It does restate verbatim the court's rulings as memorialized in the minute orders.

P.A.L. timely filed notice of its appeal of the "March 4, 2016" order[11] on March 22, 2016. (Rule 8.104(a)(1).) Although P.A.L. is listed as the appellant, Pedagat represents P.A.L. "pro se." Pedagat did not obtain leave of the presiding justice of this

[11] The court entered its orders into the minutes on February 25, 2016. The minutes do not indicate it ordered any party to prepare written orders. The March 4, 2016 pleading is notice of the entry of the order, not the order itself. On our own motion, we deem P.A.L.'s instant appeal to be from the February 25, 2016 orders.

court prior to filing the appeal. The appeal is otherwise proper under section 904.1, subdivision (a)(2), as the February 25, 2016 orders are orders issued after a final judgment. (§ 581d; *Vernon v. Great Western Bank* (1996) 51 Cal.App.4th 1007, 1011, fn. 2 [filed written order of dismissal constitutes an appealable judgment].)

II. DISCUSSION

Pedagat represented himself in the trial court proceedings. Although Pedagat is not listed as an appellant in the instant appeal, he is similarly representing P.A.L. "pro se" in this appeal. While Pedagat did not appeal the 2016 order in his role as an individual plaintiff, P.A.L. is also subject to the vexatious litigant pre-filing order because it is not legally distinct from Pedagat. "A sole owner is a sole proprietorship and a sole proprietorship is not a legal entity separate from its individual owner. [Citation.]" (*Ball v. Steadfast-BLK* (2011) 196 Cal.App.4th 694, 701 (*Ball*).)

Despite the fact that the prefiling order did not issue in the instant action, it operates to prohibit Pedagat, and, by extension, P.A.L., from filing "*any* new litigation in the courts of this state in propria persona without first obtaining leave of the presiding justice or presiding judge of the court where the litigation is proposed to be filed." (§ 391.7, subd. (a), italics added.) "[N]ew litigation" under section 391.7 includes an appeal of an action initiated by a vexatious litigant plaintiff. (*John v. Superior Court* (2016) 63 Cal.4th 91, 97-98 (*John*), citing *Mahdavi v. Superior Court* (2008) 166 Cal.App.4th 32, 41-42.) P.A.L. did not seek leave from the presiding justice of this court to file the instant appeal, as required by section 391.7, subdivision (a). In their briefs on appeal, both Chase and the Loanstar defendants informed this court that Pedagat had been declared a vexatious litigant and that P.A.L. is not a separate legal entity from Pedagat. P.A.L. does not dispute these claims in its reply.

Section 391.7, subdivision (c), sets forth a procedure governing the circumstance of a vexatious litigant plaintiff filing an appeal of an action he initiated without first seeking leave from the presiding justice: "any party may file with the clerk and serve, or the presiding justice . . . may direct the clerk to file and serve, on the plaintiff and other

parties a notice stating that the plaintiff is a vexatious litigant subject to a prefiling order as set forth in subdivision (a). The filing of the notice shall automatically stay the litigation. The litigation shall be automatically dismissed unless the plaintiff within 10 days of the filing of that notice obtains an order from the presiding justice or presiding judge permitting the filing of the litigation as set forth in subdivision (b)."

Under subdivision (b) of section 391.7, the presiding justice may only permit a vexatious litigant to file the appeal "if it appears that the [appeal] has merit and has not been filed for the purposes of harassment or delay." "The decision whether to allow the litigant to proceed will be made on an individual basis, taking into account such factors as the nature of the action below, the nature of the lower court's ruling, whether writ petition or appeal is the appropriate procedure for seeking review in the Court of Appeal, the litigant's claims of error and whether the litigant has demonstrated improper reasons for bringing the original litigation or for taking it to the next court level." (*McColm v. Westwood Park Ass'n* (1998) 62 Cal.App.4th 1211, 1217, disapproved of on other grounds by *John, supra*, 63 Cal.4th 91.)

Here, neither Chase nor the Lonestar defendants filed formal notice that P.A.L./ Pedagat is a vexatious litigant subject to a prefiling order. Rather, each respondent inserted a footnote into its responding brief indicating Pedagat was declared vexatious by the Santa Clara County Superior Court. While the presiding justice of this court could direct the court clerk to serve notice under section 391.7, subdivision (c), doing so would be futile, given that the parties have fully briefed the merits of the appeal. Having reviewed the briefs, and considered the nature of the action below, the nature of the lower court's ruling, P.A.L.'s claims of error, and whether P.A.L. has demonstrated improper reasons for bringing the original litigation or this appeal, we conclude P.A.L.'s appeal does not have merit. As we conclude that the presiding justice would not have issued a prefiling order had P.A.L. sought one as required by section 391.7, we will dismiss the appeal accordingly.

III. DISPOSITION

The appeal is dismissed.